

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Closed Captioning of Video Programming	)	CG Docket No. 05-231
	)	
Telecommunications for the Deaf, Inc.	)	
Petition for Rulemaking	)	



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**COMMENTS OF THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation’s cable television households and owners and operators of more than 200 cable program networks.

The cable industry has made enormous strides in providing captioned programming over the last five years. The industry takes seriously its captioning obligations and has devoted significant resources to serving its deaf and hard-of-hearing customers with thousands of hours daily of captioned entertainment and informational programming. Cable programmers have not only reached, but have often exceeded, the FCC-established benchmarks for captioned programming. Even more captioned cable programming will be available next year as the 100 percent captioning benchmark for new non-exempt programming is reached.

The Notice asks whether more government regulations – regulations that in several cases the agency has twice rejected – should be overlaid on the existing captioning rules. In particular, the Notice seeks comment on a range of proposals from Telecommunications for the Deaf

(“TDF”) and others. We share the FCC’s and deaf community’s interest in ensuring high quality captioning. However, these proposals would needlessly require cable operators and program networks to devote significant resources to paperwork, reporting and monitoring. No problem of any magnitude has been shown that justifies imposition of these new burdens. The occasional technical glitch or isolated error does not support the sweeping new proposed rules.

As explained below, the Petition does point out aspects of the rules that can be modified to better fit with the soon-to-be-higher captioning thresholds. In particular, we agree that deadlines for responding to complaints can be shortened in some cases to no longer require complainants to wait until 45 days after the calendar quarter for a response. In the main, however, we believe that the proposals to adopt new captioning rules would be burdensome and unnecessary.

## **ARGUMENT**

### **I. “NON-TECHNICAL” QUALITY STANDARDS WOULD IMPOSE SIGNIFICANT AND UNNECESSARY BURDENS**

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The NPRM asks whether the Commission should adopt “non-technical quality standards” for captions. The Notice in particular seeks comment on whether agency rules should dictate “accuracy of transcription, spelling, grammar, punctuation, placement, identification of non-verbal sounds, pop-on or roll-up styles, verbatim or edited for reading speed, and type font....”<sup>1</sup> This is not the first time the FCC has examined this proposal, and it should reject it again.

When initially declining to adopt such standards, the Commission expressed “concern[] about the administrative burden that would be imposed on video programming providers and the Commission if millions of hours of television programming must be monitored to make sure that

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<sup>1</sup> Notice at ¶ 13.

no more than a specified percentage of the words are wrong, misspelled or missing at the same time that mandatory captioning is being implemented.”<sup>2</sup> The agency left “development of quality standards to the marketplace,”<sup>3</sup> reasoning that “we are allowing video programming providers to establish quality standards and quality controls for the non-technical aspects of captioning through their arrangements with captioning suppliers or as part of the requirements of their programming contracts and licensing agreements.”<sup>4</sup>

The Commission was right to rely on contracts and marketplace incentives, rather than regulation, to achieve these results. As anticipated, the industry has taken steps on its own to ensure that captions achieve a high degree of accuracy.

Programmers employ several methods to ensure caption quality. As the initial captioning order expected, cable programmers enter into captioning contracts that typically include quality and accuracy provisions. Cable programmers continually review the performance of captioning services they use. Captioners themselves compete on the basis of accuracy in seeking to attract and maintain their cable programming client base.<sup>5</sup>

Live captioning, nonetheless, poses particular challenges. Live captioners operate under extreme pressure, with no time to correct for errors. “[A]t 250 words per minute, even the best and most experienced stenocaptioner may make several errors per minute.”<sup>6</sup> Mistakes can be made by a captioner hitting the wrong key or a computer not recognizing the word as entered.

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<sup>2</sup> *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd. 3272, 3374-75 (1997).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., [www.vitac.com/services/live.htm](http://www.vitac.com/services/live.htm) (“Our realtime captioners have extensive training on captioning techniques; they have to perform at an accuracy rate of at least 98%.”); [www.captionreporters.com/quality.htm](http://www.captionreporters.com/quality.htm) (“Caption Reporters, Inc. remains on-line and maintains an accuracy rate of 98%”).

<sup>6</sup> [http://main\\_wgbh.org/wgbh/pages/mag/resources/guides/mag\\_guide\\_vol9.html](http://main_wgbh.org/wgbh/pages/mag/resources/guides/mag_guide_vol9.html).

Applying hindsight to punish those mistakes through non-technical quality regulations would be not only unfair but enormously burdensome.

While doing little to prevent these types of errors, adopting the FCC's proposed rules would do much to increase captioning costs. Considering that there are currently nearly 400 cable networks, most of which provide captioned material, the costs of monitoring those thousands of hours of programming each week would be enormous. This use of cable network resources for monitoring spelling and grammar errors would increase the costs and burdens of captioning, perhaps leading to a reduction in the network's overall captioning efforts under the gross revenues monetary threshold.<sup>7</sup>

Captioning organizations strive to provide accurate captions, as do the cable networks that include these captions in the thousands of hours of material provided each day. Like any other human endeavor, though, captioning is a fallible process. Government regulation cannot guarantee perfection and would be the wrong tool to attempt to establish "non-technical" quality standards.

## **II. TECHNICAL STANDARDS ARE UNNECESSARY**

Existing captioning rules require cable operators to pass through to customers captions received from program networks and broadcast stations. The Notice asks whether there is a "need for additional mechanisms and procedures in addition to the 'pass through' rule to prevent technical problems from occurring and to expeditiously remedy any technical problems that do arise."<sup>8</sup> The Petition provides no evidence that there are any technical problems that warrant adoption of additional rules, and we urge the Commission to refrain from doing so.

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<sup>7</sup> 47 C.F.R. § 79.1(11) (capping captioning expenditures at 2 percent of gross revenues).

<sup>8</sup> Notice at ¶ 20.

While the Notice contains a list of technical problems that TDI asserts occur “frequently,”<sup>9</sup> there is no suggestion that these problems are frequently related to anything having to do with cable operators or programmers. Discussions with NCTA’s member companies, in fact, suggest that neither cable programmers nor operators are typically the source of these types of problems.<sup>10</sup> Operators and programmers have received few complaints over the last 5 years related to captioning. The FCC’s own records show that the agency has had only a handful of complaints in the captioning area.<sup>11</sup> There is simply no evidence of a problem that warrants changing the rules.

This is not to say that there may not be an occasional inadvertent error or technical glitch that results in a temporary loss of captioning.<sup>12</sup> But that does not justify the sweeping monitoring that TDI proposes.<sup>13</sup> Such a measure is not only unnecessary but also would be highly burdensome, both to cable operators and cable programmers.

Cable networks routinely check their programming to ensure that it contains captions. They monitor their signal to ensure the quality of each program’s technical specifications, including video, audio and line 21 captions. And operators routinely monitor their equipment to

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<sup>9</sup> *Id.* at ¶ 18. TDI asserts that captions turn off ten minutes before the end of national network programming; disappear one hour into a two-hour movie; are absent even though program schedules indicate that a program is captioned; are illegible; appear on a national program in one locality but not another; and are missing from repeats of programs or are scrambled and unreadable.

<sup>10</sup> See, e.g., [www.ncicap.org/capqual.asp](http://www.ncicap.org/capqual.asp) (suggesting that there are a variety of explanations for technical problems with captions, many of which have nothing to do with the programmer or operator); [http://main.wgbh.org/wgbh/pages/mag/resources/guides/mag\\_guide\\_vol9.html](http://main.wgbh.org/wgbh/pages/mag/resources/guides/mag_guide_vol9.html) (explaining that captioning problems are often related to equipment in customers’ homes).

<sup>11</sup> For the third calendar quarter of 2005, the FCC received a total of just 15 complaints related to accessibility for cable and satellite services. “Accessibility” can cover a range of issues and does not solely relate to captioning. “Quarterly Report on Informal Consumer Inquiries and Complaints Released,” CGB (released Nov. 4, 2005). Only 11 complaints were received during the prior quarter. *Id.*, released Sept. 28, 2005.

<sup>12</sup> Captions may be lost for a variety of reasons, including noise on the phone lines that transmit the captions or problems caused by the equipment in a customer’s home. [www.ncicap.org/capqual.asp](http://www.ncicap.org/capqual.asp)

<sup>13</sup> Notice at ¶ 25.

ensure that it is in proper working order and able to pass through captions.<sup>14</sup> Given these existing controls, any FCC-imposed monitoring requirements are unnecessary.

Routine checks help ensure that programming containing intact captions leaves the program network and arrives at the customer's television set. But there are inherent limits as to how much can be fixed along that path once a program is transmitted by satellite nationwide. Programmers cannot insert captioning in real time on prerecorded programming transmitted to customers. Nor are operators set-up to superimpose captions on programs as they come into the system headend. Therefore, economic burdens aside, a requirement to monitor full-time could not prevent or instantaneously correct missing or garbled captions.

A monitoring requirement also would be extremely burdensome. Cable operators today routinely transmit hundreds of channels of video programming. In fact, the average cable system transmits nearly 225 separate channels of video programming.<sup>15</sup> If 20 hours of programming were captioned on each network daily, that translates into 4,500 hours of captioned programming transmitted every day and 135,000 hours each month on the average cable system.

Nationwide, monitoring would impose an enormous burden on the cable industry. There are approximately 8,850 cable system headends in the United States at which programs are received, either by satellite or terrestrial delivery. Operators nationwide would need equipment and personnel to monitor captions on nearly 2 million channels. The equipment available today

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<sup>14</sup> The cable industry is required to pass through captioning on line 21 of the vertical blanking interval, and its equipment has been manufactured to do so. See 47 C.F.R. § 76.606 (cable captioning requirements). The equipment ordered and purchased by cable operators is sensitive to the need to protect line 21 against interference or stripping of captioning content. For example, representative samples of set-top boxes are tested to verify captioning capabilities prior to putting these boxes in the field. In addition, the cable industry proactively finalized the standards necessary for the successful migration of captioning from analog to the digital signal formats.

<sup>15</sup> 2004 Cable Price Survey, MM Docket 92-266 at p. 33 attachment 17.



would require a cable operator to monitor a single channel at a time to ensure that it contains captioning. Since there is no existing way to simultaneously monitor captioning across a system's entire programming line-up, a monitoring rule would force operators to devote significant manpower to the effort.

Continued reliance on a combination of routine checking and the complaint process, therefore, is the best and, frankly, the only feasible way to ensure the reliability of captioning without imposing significant, unnecessary costs. And that process, so far as we are aware from discussions with operators and programmers, has worked well. Few complaints have been received. Those that have been received for the most part are able to be rapidly resolved, as described below.

### **III. COMPLAINT RESPONSE TIMES CAN BE SHORTENED FOR CERTAIN COMPLAINTS**

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FCC rules require that complaints regarding captioning must first be directed to cable operators and other multichannel video programming distributors.<sup>16</sup> The rules, adopted when captioning was being phased in through the use of quarterly benchmarks, allow cable operators to respond to complaints within 45 days after the end of a quarter in which the violation is said to have occurred, or 45 days after receipt of the complaint, whichever is later. The Notice asks both whether to allow for shorter complaint and operator response times, and whether complainants should be able to complain directly to the FCC without contacting their cable provider.<sup>17</sup> For the most part, the process works well to resolve complaints, and we believe that the existing system

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<sup>16</sup> 47 C.F.R. § 79.1(g).

<sup>17</sup> Notice at ¶ 31.

should remain in place. However, we agree that given the increase in the captioning benchmark, the rules could be modified to shorten the time between a complaint and response in some circumstances. Specifically, the rules could be amended to no longer require complainants to wait for a response until 45 days after the end of the calendar quarter for complaints relating to technical issues or relating to a network's benchmark compliance where the network provides only "new" programming.

As NCTA's Opposition to the Petition for Rulemaking explained, cable operators have customer service representatives ("CSRs") who are trained to resolve many customer complaints. NCTA pointed out previously that cable operators have these mechanisms in place to rapidly address service interruptions and to respond to customer inquiries.<sup>18</sup> Even in the absence of regulatory requirements, programmers also often routinely respond to captioning questions directly received from viewers.

Given the various reasons why captions may not appear on a customer's television set, CSRs may not always be able to analyze and resolve complaints related to captioning on the spot. Operators may need time to track down the source of a technical issue. A technical problem could arise any place along the path from creation to transmission to receipt of the captions. The problem could be at the cable system level; if not, a cable operator may need to contact the cable program network or broadcast station to determine the source of the problem; in other cases, the problem may reside at the customer's television set or set-top box. While investigating the source of a technical glitch may take time, the record contains no evidence that problems have

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<sup>18</sup> See 47 C.F.R. § 76.309 (customer service requirements).

been allowed to languish until the end of a calendar quarter. We therefore have no objection to the Notice's suggestion that the operator's 45 day response time should be measured from the time of a complaint about technical problems with captioning, rather than 45 days after the end of the calendar quarter.

We also agree with the Notice that the complaint rules concerning compliance with quarterly captioning benchmarks can be modified to take into account completion of the phase-in period for captioning new programming. When the rules were first adopted, and much of cable's programming was not yet required to be captioned, it made sense to provide the 45-day-after-quarter-end timetable. But as of January 1, 2006, all new nonexempt programming must be captioned. Under these circumstances, it may be appropriate for the FCC to also lift the requirement to wait until the calendar quarter's end before the 45-day response time begins for networks that provide only "new" programming. However, the rules should continue to allow the same amount of response time as today for the networks that offer only "pre-rule" programming or a mix of old and new programming. Because pre-rule programming has a lower captioning benchmark, networks that provide some of this programming may not be able to accurately measure their benchmark compliance until the end of the calendar quarter.

Other aspects of the complaint process should remain unchanged. For example, complaints should continue to be directed to cable operators as the first point of contact, rather than to the Commission. This approach is consistent with FCC precedent in other areas.<sup>19</sup>

This process is more efficient because cable providers working in tandem with programmers are better positioned to resolve or clarify captioning issues. It also preserves scarce

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<sup>19</sup> See, e.g., *id.* § 76.1003(b) (program access rules); *id.*, § 76.1302(b) (notice required prior to filing complaint alleging violation of carriage agreement rules).

FCC resources by limiting complaints that reach the agency to those that the operator cannot resolve. Moreover, cable customers know how to contact their cable operators, who have personnel dedicated to this purpose, often 24 hours a day.

This existing system works to more rapidly resolve complaints. Based on operators' and programmers' experiences to date, successfully resolving complaints depends on access to as much timely and accurate information as possible. Interposing another step in the process by designating the agency as the initial point of contact will likely slow down the resolution of the complaint without necessarily leading to any better results.

#### **IV. FINES AND PENALTIES FOR INADVERTENT FAILURES TO CAPTION ARE NOT WARRANTED**

The Notice also asks whether to adopt specific forfeitures for failure to comply with the captioning rules.<sup>20</sup> TDI's Petition asks the Commission to establish an \$8,000 fine for each hour of new programming that is not captioned. We do not believe that a case has been made for imposing these punitive measures.

Contrary to the impression TDI gives in its petition, this is not a case of widespread non-compliance that might warrant adoption of extraordinary fines. TDI has provided no evidence that programmers or operators are willfully ignoring their captioning obligations – nor is there any such evidence. Rather, so far as we are aware from discussions with our operator and programmer members, captioning has been a success. Thousands of hours of captioned material are made available every day. Cable networks have every incentive to ensure that their cable operator customers receive programming captioned in compliance with the rule. Indeed,

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<sup>20</sup> Notice at ¶ 39.

operators require and rely on certifications from program networks that they will be in compliance with the captioning rules.

The Commission is not powerless to enforce its rules should it find non-compliance. The FCC already may assess fines for willful and repeated violations of any of its rules.<sup>21</sup> But none of the base forfeitures apply to the types of inadvertent technical failures or glitches in equipment that might cause captions to be lost.<sup>22</sup> It would be inappropriate to include inadvertent captioning mistakes in the base forfeiture guidelines.

Indeed, the Commission has recognized that “there may be time when it will be difficult for a video programming provider to present 100% of its new nonexempt programming with captions.”<sup>23</sup> While the Commission on reconsideration of its initial captioning order eliminated the “de minimis” exemption designed to automatically account for these occasional glitches, it was sensitive to the “variety of circumstances where captioning may be problematic.”<sup>24</sup> These include situations such as equipment failures, inability to obtain caption resources on short notice, and the receipt of programming without the expected captions.<sup>25</sup> Taking these factors into consideration, the FCC announced its intent “to enforce this requirement in a manner that ensures that we do not penalize video programming distributors that are generally in compliance with the

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<sup>21</sup> 47 C.F.R. § 1.80(a)(2).

<sup>22</sup> In other areas, the FCC has made clear that cable operators should have an opportunity to cure similar problems. See, e.g., id. § 76.601 note 1 (requiring local franchising authorities to notify the cable operator and providing thirty days for operator to come into compliance with any perceived signal quality problems).

<sup>23</sup> *Reconsideration Order*, 13 FCC Rcd. at ¶ 10.

<sup>24</sup> Id.

<sup>25</sup> Id.

rules except for a *de minimis* amount of uncaptioned programming.”<sup>26</sup> The FCC should continue to show sensitivity in this area.

## V. COMPLIANCE REPORTS ARE BURDENSOME AND UNNECESSARY

The Notice asks whether cable operators should be required to file reports demonstrating the amount of closed captioning they provide.<sup>27</sup> Such a measure would impose significant burdens on cable operators and is wholly unnecessary. The Commission has twice before rejected this proposal for reasons that remain valid today.

As NCTA’s Opposition to the Petition for Rulemaking detailed, the FCC’s initial captioning order examined and rejected a proposal to enforce its captioning rules through a reporting obligation.<sup>28</sup> The agency decided against this recordkeeping obligation, “believ[ing] that specific recordkeeping or filing requirements would be unnecessarily burdensome and administratively cumbersome.”<sup>29</sup> On reconsideration, the Commission upheld this determination.<sup>30</sup>

NCTA pointed out that the Commission typically does not impose these types of requirements where, like here, compliance is complaint-driven.<sup>31</sup> And where the FCC has required records – such as in the case of the children’s television rules – those records apply to only a handful of channels. Here, hundreds of channels are required to caption thousands of hours of programming daily. The burdens would be much greater, as the Commission

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<sup>26</sup> *Id.*

<sup>27</sup> Notice at ¶ 43.

<sup>28</sup> *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd. 3272 at ¶ 244.

<sup>29</sup> *Id.*

<sup>30</sup> *Reconsideration Order*, 13 FCC Rcd. 19,973 at ¶118.

<sup>31</sup> NCTA Opposition to Petitions for Reconsideration, MM Docket No. 95-176 (Nov. 28, 1997) at 16.

recognized: “the captioning rules apply to every channel carried by an MVPD.... Accordingly, a recordkeeping requirement would be significantly more extensive and costly [than the children’s television recordkeeping requirements].”<sup>32</sup> Given the increase in the number of program networks that are required to caption, the potential burden has increased, not diminished, since the FCC first rejected this idea.

The FCC already has determined that combining random agency audits with the complaint process will best ensure compliance with the rules without unduly burdening cable operators and programmers.<sup>33</sup> That continues to represent the best balance under these circumstances.

The Notice also asks whether “the Commission’s rules should be amended to place a greater burden on video programming distributors to ensure that the programming they carry is captioned, regardless of the assurances they receive from programmers.”<sup>34</sup> But such measures are unnecessary. There has been only one adjudicated violation of the rules regarding the amount of captioned cable programming, and in that case both the programmer and operator believed (mistakenly) that they were in compliance with the rules.<sup>35</sup> Program networks have every incentive to self-police. Requiring cable operators to do more to also verify that programming is captioned will upset the careful balance of interests embodied in the FCC rules and threaten to make the entire captioning regulatory regime unworkable.

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<sup>32</sup> *Closed Captioning and Video Description of Video Programming*, 13 FCC Rcd. 19973, 20027 (1998).

<sup>33</sup> *Id.* at 20026-20027.

<sup>34</sup> Notice at ¶ 43.

<sup>35</sup> *Brick v. Comcast Cablevision of Maryland and Courtroom Television Network*, 17 FCC Rcd. 570 (2002).

## **VI. ELECTRONIC NEWSROOM TECHNIQUE CAPTIONING SHOULD STILL BE COUNTED TOWARD THE BENCHMARK**

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Many cable program networks provide live material for a substantial part of their day. National cable networks that serve at least 50 percent of the multichannel video programming households cannot count electronic newsroom technique (“ENT”) captioning towards compliance with the benchmark. They instead must use real-time captioning for their live programming in order to satisfy the rules. The Notice asks whether to further restrict the use of ENT captioning.<sup>36</sup> We do not believe that any such restrictions would be reasonable. Many less widely-distributed cable networks that provide a substantial amount of live programming must rely on ENT captioning to comply with their captioning obligations.

In particular, local cable news operations often transmit programming 24 hours a day, much of it live. These news channels typically operate on a limited budget. While suffering from certain inherent limitations (e.g., only prescribed material can be presented in a textual format), ENT captioning offers a cost-effective way to provide a significant portion of these local newscasts to deaf and hard-of-hearing viewers.

The Commission suggests that the “cost of captioning has decreased significantly since the 1996 Report to Congress.”<sup>37</sup> However, it is not clear that the costs of real-time captioning have diminished significantly if at all, and there is evidence that real-time captioners remain in short supply.<sup>38</sup> In any event, even if some costs have decreased, these are recurring costs that for live 24 hour news channels still are prohibitive. Moreover, there is reason to expect that

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<sup>36</sup> Notice at ¶ 48.

<sup>37</sup> Id.

<sup>38</sup> Some have estimated that while today there are 300 English language and 6 Spanish language trained real-time captioners, there will be a need for thousands more trained captioners to meet the new benchmarks. See S. Rep. No. 109-93, 109<sup>th</sup> Cong. 1<sup>st</sup> Sess. (June 27, 2005).



increasing demand on captioning services due to next year's 100 percent new program captioning obligation will ensure costs remain high.

Eventually, technology may reduce these costs further. Voice recognition technology, for example, is on the drawing board and promises to be much more cost-effective.<sup>39</sup> At the very least, the Commission should hold off on reevaluating use of ENT captioning until technology has lived up to its promises and constitutes a truly viable alternative to real-time captioning.

### **CONCLUSION**

The cable industry is proud of its captioning efforts over the last five years. As an industry, we are always looking for ways to better serve customers who rely on captioning. But we fundamentally disagree that many of the additional regulations proposed by TDI are either necessary or helpful to achieving that goal. Some of the proposals incorporated in the Notice would needlessly increase captioning expenses and would impose significant new burdens on cable operators and programmers. The Commission should again reject these proposals.

Respectfully submitted,

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<sup>39</sup> *Reconsideration Order*, 13 FCC Rcd. at 19993 ("[W]e recognize that in the future there may be other techniques for captioning live programming that provide full access [e.g., voice recognition].").